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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EDISON REINALDO BOLANOS-ANRANGO,

Defendant and Appellant.

A150354

(City & County of San Francisco
Super. Ct. No. 226304)

Defendant Edison Reinaldo Bolanos-Anrango appeals his conviction for oral copulation of an unconscious person. He contends the evidence was insufficient to establish that the victim was unconscious of the nature of the act and that the court erred in imposing the upper term sentence of eight years in prison. We reject both contentions and shall affirm the judgment.

Background

Defendant was found guilty by a jury of violating Penal Code¹ section 288a, subdivision (f), by committing oral copulation on Laura M. while she was unconscious of the nature of the act within the meaning of the statute.² The relevant evidence at trial was as follows.

On April 15, 2016, after drinking between six and eight alcoholic drinks, smoking marijuana, and dining over the course of seven hours at a San Francisco bar and

¹ All statutory references are to the Penal Code.

² Defendant was also charged with violating three other provisions as to which the jury was unable to agree and which were ultimately dismissed.

restaurant, Laura went with defendant and two others to defendant's home. She arrived feeling "drunk" but "still . . . in control" of herself, drank part of another glass of wine, and asked for some music to dance—the "last thing" she remembered. According to her testimony, at some point in time she "lo[st] consciousness and pass[ed] out." She stated, "At a certain point I guess the effects of the alcohol kind of hit me all at once and I felt like I couldn't really stand any more and I kind of stumbled to the floor and laid down face down on the floor. [¶] . . . [¶] At first I was very disoriented. I could feel sensations, but I wasn't clear about what was happening. [¶] . . . [¶] I was vaguely aware of someone touching me as I was laying down. Someone was over me, touching me. The first – the first really clear memory I have is feeling hands under – under my belly, unbuttoning my jeans. [¶] . . . [¶] I feel my – my jeans and my underwear being pulled down to my thighs. And then I feel someone licking me [¶] . . . [¶] [a]round my anus." Asked what her mental state was at that time, Laura answered, "Kind of confused about what's going on. As I'm starting to become more conscious I start wondering what – what's happening, who's doing this, what situation am I in? [¶] . . . [¶] I think I was – just at first it was just I was just feeling the sensations and those questions hadn't even come up. I wasn't – I was just like coming to. But as I started to come to more, those questions started to arise and I – I was not really – I felt like I just couldn't move my body. I just didn't have control over my body."

Laura's consciousness was elevated, she testified, when she "felt a penis kind of jabbing around. I think it entered my vagina for a moment and then it started pushing into my anus. [¶] . . . [¶] It was very painful." At that point she realized she was "in danger and . . . needed to get up and get out of there as quickly as possible," which she did.³ Defendant was the only person in the room just before she left and in a subsequent

³ The nurse who examined Laura the following day testified that Laura told her "she felt like she was in a dream-like state. So she explained that she didn't have full awareness, but that she had full awareness when the person's penis penetrated her anus. [¶] . . . [¶] . . . [S]he felt like she was in this dream-like state and felt that there was kissing or licking on her buttocks, and I believe she also remembers on her anus. When there was the penetration with the penis, she came to and had more awareness."

pretext call acknowledged that he had massaged Laura but denied having sex with her or “licking [her] asshole.”

Following the jury’s guilty verdict, the court sentenced defendant to the aggravated term of eight years. Defendant has timely appealed.

Discussion

1. The conviction is supported by substantial evidence

Section 288a (now section 287), subdivision (f) prescribes punishment for “[a]ny person who commits an act of oral copulation, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act” The statute further provides that “[a]s used in this subdivision, ‘unconscious of the nature of the act’ means incapable of resisting because the victim meets one of the following conditions: [¶] . . . [¶] (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. . . .”

Relying largely on *People v. Lyu* (2012) 203 Cal.App.4th 1293, defendant argues the evidence here was insufficient to support the finding that Laura was unconscious of the nature of the act within the meaning of the statute when the oral copulation occurred. However, *Lyu* rejected the argument that the victim in that case was unconscious of the nature of the act because she “ ‘did not see the attack coming.’ ” (*Id.* at p. 1301.) In that case the victim was “instantly aware” of what the defendant was doing to her. She “instantly knew, perceived, and was cognizant that the act occurred” and immediately protested. (*Ibid.*) Here, the testimony quoted above shows that Laura’s mental state was much different when the oral copulation occurred. She was, she testified, confused and not immediately aware of what was being done to her. If the testimony was believed by the jury, as it presumably was, that is sufficient. Laura need not have been totally unconscious. “We presume the Legislature meant what it said when it added—‘of the nature of the act.’ ” (*People v. Howard* (1981) 117 Cal.App.3d 53, 55.)

2. *The court did not abuse its discretion in imposing the upper term*

Defendant contends the trial court abused its discretion in imposing the upper term of eight years' imprisonment for his offense. Defendant's probation report and the prosecutor's sentencing memorandum identified as an aggravating factor only the victim's vulnerability, although the prosecutor also argued that defendant's refusal to take responsibility for the offense warranted a more severe sentence. Defendant's attorney argued that the victim's vulnerability could not be considered since that was inherently an element of the offense, and the attorney brought to the court's attention numerous positive personal characteristics of the defendant. The court indicated that it had considered the statements of defendant's favorable character witnesses and of the victim, who told the court that the incident had profound adverse effects upon her, and then gave as its explanation of its sentencing choice the following: "What the court finds quite disturbing is that [defendant] is neither remorseful nor apologetic. And that's disappointing. This is a very serious crime."

Defendant argues on appeal that the court erred in aggravating the sentence based on his lack of remorse. The Attorney General initially argues that the contention has been forfeited because not explicitly raised in the trial court, but viewing the sentencing proceedings in context we believe all relevant factors were brought to the court's attention and that forfeiture of the issue would not be appropriate. However, we do not believe the record establishes an abuse of discretion in the choice of the upper term.

Although not specifically listed as an aggravating factor in California Rules of Court, rule 4.421, " '[l]ack of remorse may be used as a factor to aggravate under California Rules of Court, rule [4.408] unless the defendant has denied guilt *and* the evidence of guilt is conflicting.' " (*People v. Leung* (1992) 5 Cal.App.4th 482, 507; see also, e.g., *People v. Key* (1984) 153 Cal.App.3d 888, 900.) In urging the trial court to impose a lesser sentence, defendant did not argue that there was a conflict in the evidence as to whether he had committed the offense but only that there were overriding circumstances in mitigation: "Here, at the time of the incident, [defendant] had been

under the influence of alcohol and marijuana. He mistakenly believed, just like his friends, that Laura was interested in him. His conduct was the product of mistake, one that he will never make again. It was not the product of ill intentions or bad character. Rather, it was a single and instantaneous moment of bad judgment—one that he will remember for the rest of his life.” Although there was evidence that defendant had denied in a pretext call from Laura, and again to the police, that he had any sexual contact with Laura, there was no such testimony at trial. Indeed, there was evidence that defendant’s DNA was found in Laura’s underwear. Therefore it was well within the trial court’s discretion to consider defendant’s failure to acknowledge his responsibility, to apologize or to reflect any remorse as aggravating factors justifying imposition of the aggravated term of punishment.

Disposition

The judgment is affirmed.

Pollak, P.J.

We concur:

Streeter, J.

Tucher, J.